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No. 82-368

In the Supreme Court of the United States

OCTOBER TERM, 1982

HUDSON FARMS, INC., PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

RICHARD MICHAEL FISCHL
Attorney

National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether petitioner's live-haul truck drivers and yard personnel are "agricultural laborers" within the meaning of Section 2(3) of the National Labor Relations Act.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statutes involved 2

Statement 2

Argument 5

Conclusion 7

TABLE OF AUTHORITIES

Cases:

Bayside Enterprises, Inc. v. *NLRB*, 429 U.S. 298 ..... 5, 6

Coleman v. *Sanderson Farms, Inc.*, 629 F.2d 1077 6

Farmers Reservoir & Irrigation Co. v. *McComb*, 337 U.S. 755 3

Valmac Industries, Inc. v. *NLRB*, 599 F.2d 246 4

Victor Ryckebosch, Inc., 189 N.L.R.B. 40, enforcement denied, 471 F.2d 20 ..... 3, 4, 5

Statute and regulation:

National Labor Relations Act, 29 U.S.C. (& Supp. IV) 151 *et seq.* :

Section 2(3), 29 U.S.C. 152(3) 2, 3
Section 8(a)(1), 29 U.S.C. 158(a)(1) 4
Section 8(a)(5), 29 U.S.C. 158(a)(5) 4

Page

Statute and regulation—Continued:

Fair Labor Standards Act, 29 U.S.C. (& Supp. IV) 201 *et seq.* :

Section 3(f), 29 U.S.C. 203(f) 2, 3, 6

29 C.F.R. 780.135 6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-4a) is reported at 681 F.2d 1105. The decision and order of the National Labor Relations Board (Pet. App. 5a-16a) are reported at 258 N.L.R.B. 391. The Regional Director's decision and direction of election (Pet. App. 16a-24a) in the underlying representation proceeding are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on July 1, 1982. The petition for a writ of certiorari was filed on September 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 2(3) of the National Labor Relations Act, 29 U.S.C. 152(3), and Section 3(f) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 203(f), are set out at Pet. App. 23a-24a.

STATEMENT

1. Petitioner purchases poultry breeding stock and places it with a number of contract producers. Some of the eggs produced by the hens left with the contract producers are transported to petitioner's hatcheries. When the eggs hatch, the chicks are immediately delivered to contract grow-out farms. Petitioner provides the contract grow-out farmers with feed, medication, and its own broiler service personnel. The contract grow-out farmers feed and care for the chicks until they are market-weight—approximately seven to eight weeks. Petitioner retains title to the chicks throughout the grow-out operation. (Pet. App. 3a, 18a n.2.)

Petitioner's live-haul drivers and yard personnel are involved in the two-stage transfer of the market-weight chicks from the contract grow-out farms to the processing plant (owned by petitioner's parent company) where the chicks are slaughtered. The drivers transport the chicks by trailer-truck from the grow-out farms to the live-haul lot adjacent to the processing plant; the yard personnel weigh the full trailers, deliver the chicks to the plant, and weigh the empty trailers. (Pet. App. 18a n.2.)

2. In December 1980, a Teamsters Union local filed a representation petition with the NLRB seeking certification as the collective-bargaining agent of petitioner's live-haul truck drivers and yard personnel. Petitioner asserted that the employees were agricultural laborers and therefore

outside the scope of Section 2(3) of the National Labor Relations Act, 29 U.S.C. 152(3). (Pet. App. 16a-22a.)[1]

Following the Board's decision in *Victor Ryckebosch, Inc.*, 189 N.L.R.B. 40 (1971), enforcement denied, 471 F.2d 20 (9th Cir. 1972), the Regional Director concluded (Pet App. 19a-20a) that petitioner's live-haul drivers and yard personnel are not agricultural laborers. In *Ryckebosch* the Board evaluated the status of live-haul drivers who transported chicks from contract grow-out farms to a processing plant (189 N.L.R.B. at 44-48), using the analysis set out in *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755 (1949), which distinguishes between "primary" and "secondary" agricultural activity for purposes of Section 3(f) of the FLSA (and hence Section 2(3) of the National Labor Relations Act).[2] Since the live-haul drivers in *Ryckebosch* were not "raising poultry" but transporting marketweight chicks from farms to a processing plant, the Board

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[1]As defined in Section 2(3) of the National Labor Relations Act, the term "employee" does not include "any individual employed as an agricultural laborer." Since 1946, Congress has linked the phrase "agricultural laborers" to the definition of "agriculture" in Section 3(f) of the FLSA, 29 U.S.C. 203 (f), which in pertinent part is as follows:

> "Agriculture" includes farming in all its branches and among other things includes * * * the raising * * * of poultry, and any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

[2]"Primary" agriculture embraces only actual farming operations such as soil tillage, dairying, or the raising of poultry. "Secondary" agriculture is the work performed "by a farmer" or "on a farm," "incident to or in conjunction with" "primary" farming activity; secondary agriculture includes delivering the agricultural product to market. Employees who handle, work with, or otherwise perform tasks incidental to the agricultural product of farmers other than their own employer are not engaged in "secondary" farming activity. *McComb, supra*, 337 U.S. at 762-763, 766-767 & n.15.

concluded they were not engaged in "primary" agricultural activity (189 N.L.R.B. at 44 & n.9). Nor were the live-haul drivers engaged in "secondary" agriculture, because their employer was not a "farmer" with respect to the poultry they handled. The Board explained (*id.* at 46):

> [e]ven though [the employer] has invested in and owns a substantial equity in the poultry raising operation, it is nevertheless not the "farmer" who is raising the poultry on the farm. The contract grower is the "farmer" raising the poultry on land in his possession and control. The [employer] is predominantly an investor, a marketer, and a shipper of poultry to processing plants.

Here, the Regional Director found (Pet. App. 19a-20a) "identical facts," and therefore rejected petitioner's claim that the live-haul drivers and yard personnel at issue are agricultural laborers. The Board sustained the Regional Director's decision (Pet. App. 7a).

The union won the representation election and was certified by the Regional Director as the bargaining agent of the employees (*id.* at 8a). Petitioner contested the validity of the certification, and refused to bargain with the union, which therefore filed unfair labor practice charges with the Board (*id.* at 5a-7a). The Board found that petitioner's refusal to bargain violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158 (a)(1) and (5), and issued a bargaining order (Pet. App. at 10a-11a, 13a-14a).

3. The court of appeals enforced (Pet. App. 2a-4a) the Board's order on the authority of *Valmac Industries, Inc.* v. NLRB, 599 F.2d 246, 249 (8th Cir. 1979). In *Valmac Industries,* the court of appeals sustained the Board's conclusion that "employees who transported live poultry from an independent grower's farm to their employers' processing plant were 'employees' not 'agricultural laborer[s]' under the Act" (Pet. App. 3a-4a).

ARGUMENT

The decision below—sustaining the Board's finding that petitioner's live-haul drivers and yard personnel are not agricultural laborers—is fully consistent with this Court's decision in *Bayside Enterprises Inc.* v. *NLRB*, 429 U.S. 298 (1977).

Contrary to petitioner's contention (Pet. App. 13-19), *Bayside* unambiguously approves the Board's position that an "employer's status as a farmer engaged in the raising of poultry ends with respect to [the] chicks" when the "employer contracts with independent growers for the care and feeding of the employer's chicks." *Bayside, supra*, 429 U.S. at 302 & n.9 (citation omitted)).[3] Accordingly, the chicks hauled to the processing plant were not petitioner's farm products but those of the contract growers. Hence, petitioner's drivers and yard personnel were not engaged in secondary agriculture (see note 2, *supra*). [4]

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[3]In upholding the Board's determination that drivers who transported feed from their employer's feed mill to contract poultry farms were not agricultural laborers, the Court rejected the poultry producer's contention that it was a "farmer" with respect to poultry it entrusted to the farms of contract growers, even though the producer supplied the farms with feed, medicine, fuel, litter, and vaccine, and retained title to the chicks(429 U.S. at 301-302).

[4]The Board's position does not "repeal[] the agricultural exemption as it relates to delivery to market" (Pet. 19). Had petitioner raised the chicks itself, instead of contracting that operation to independent growers, it would have remained a "farmer" with respect to those chicks, and petitioner's drivers who transported them to market would have been agricultural laborers.

In any event, the position urged by petitioner (Pet. 10, 12-13)—that, contrary to the teaching of *Ryckebosch* and *Bayside*, an employer resumes its status as a "farmer" with resumption of custody over poultry—would not avail petitioner here. For, the record unambiguously shows that petitioner resumes custody of the contract grow-out chicks not for the purpose of *raising* them (a "primary" agricultural activity), but solely to deliver them to the processing plant where they

There is no merit to petitioner's contention (Pet. 7-9) that the decision below conflicts with *Coleman* v. *Sanderson Farms, Inc.*, 629 F.2d 1077 (5th Cir. 1980). *Sanderson Farms* holds that employees who transport poultry from contract farmers to their employer's processing plant are agricultural laborers within the meaning of Section 3(f) of the FLSA. Nonetheless, *Sanderson* was an action to recover overtime wages under the FLSA. The case went to the Fifth Circuit on appeal from a district court decision granting the employer's motion for summary judgment and not on review of a Board order. The Fifth Circuit explicitly recognized (629 F.2d at 1081 n.4) the significance of this "different procedural posture." Thus, the court suggested that *Bayside* had only approved the Board's contrary position as a *permissible* reading of the statute. Absent "the policy of judicial deference to the administrative determinations of the National Labor Relations Board," that reading of the statute was not controlling. Accordingly, even in the Fifth Circuit *Sanderson Farms* would not be controlling in this case. Here, there is a Board determination that the employees in question are not agricultural laborers, and, as the Fifth Circuit recognized in *Sanderson*, such a determination is entitled to considerable deference "regardless of how [the court] might have resolved the question as an initial matter" (629 F.2d at 1081 n.4, quoting *Bayside, supra*, 429 U.S. at 304).

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are *slaughtered*—an activity that is not "primary" agriculture. *Bayside, supra*, 429 U.S. at 301; Department of Labor regulations, 29 C.F.R. 780.135. Accordingly, the live-haul drivers and yard personnel who assist petitioner in this aspect of its operations would not be engaged in "secondary" agriculture, even under petitioner's theory.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

RICHARD MICHAEL FISCHL
Attorney

National Labor Relations Board

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